Supreme Court, U. S.
FILED
MAY 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

_____ TERM, 19____

NO. 79-1914

ELIZABETH ANN HARBOUR,
Petitioner

v.

WILLIAM T. HARBOUR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

CRAWFORD & GRISSOM, INC.
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Houston, Texas 77002

Counsel for Petitioner

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IN THE

Supreme Court of the United States

_____ TERM, 19____

NO. _____

ELIZABETH ANN HARBOUR,
Petitioner

v.

WILLIAM T. HARBOUR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Petitioner prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of Texas entered in the above case on February 27, 1980.

OPINION BELOW

The opinion of the Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas is reported at 590 S.W.2d 828. The Supreme Court of Texas denied Petitioner's Writ of Error citing no reversible error with no opinion.

JURISDICTION

The judgments of the Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas were made and entered on November 21, 1979 and a copy thereof, is appended to this petition in the Appendix at p. A-4. The order denying Petitioner's Application for Writ of Error was dated February 27, 1980 and is appended to this petition in the Appendix at p. A-7. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

In a discovery proceeding in aid of enforcement of a judgment brought pursuant to Rule 621(a) of the Texas Rules of Civil Procedure by the Petitioner against the Respondent, the Petitioner sought to enforce a judgment debt in the amount of $25,000.00 awarded in a decree of divorce dated March 15, 1972.

The Respondent interposed a general discharge in bankruptcy entered on July 12, 1972 by way of a Motion for Protection, Plea in Abatement and Request for Restraining Order in opposition to Petitioner's Bill of Discovery. After submission of briefs and oral arguments of counsel, the court denied the Petitioner's Bill of Discovery and determined that the judgment debt sought to be enforced was dischargeable, as a matter of law, within the meaning of the Bankruptcy Act, Section 17 et. seq. 11 U.S.C.A., § 35 et. seq. as amended effective October 19, 1979. The decision of the trial court was thereafter affirmed by the Court of Civil Appeals for the 14th Supreme Judicial District of Texas on the basis that there was no language contained in the Decree of Divorce indicating that

the unequal division of community assets in favor of your Petitioner was based upon the need for future support and maintenance of the wife; and further, that for such a judgment to be non-dischargeable in bankruptcy, the decree must clearly smack of alimony on its face. The Supreme Court of Texas denied Petitioner's Application for Writ of Error on February 27, 1980, citing no reversible error in the Court of Civil Appeals' opinion. The question presented is:

> "Whether the judgment rendered by the Court of Civil Appeals for the 14th Supreme Judicial District of Texas and affirmed by the Supreme Court of Texas denies the Petitioner and other spouses similarly situated in Texas equal protection under the 14th Amendment of the United States Constitution due to the conflict between Section 17(a)(7) of the the Bankruptcy Act and Texas Marital Property Law prohibiting an award of alimony.

STATE AND FEDERAL STATUTES INVOLVED

The pertinent portions of the Bankruptcy Act, Section 17 et. seq., 11 U.S.C.A., § 35 as amended effective October 19, 1970, and the Texas Family Code Ann. Section 3.63 (1970) are set forth in the Appendix.

STATEMENT

On March 17, 1972 a Decree of Divorce was entered in the 311th District Court for the State of Texas rendering judgment in the amount of $25,000.00, together with interest at the rate of six (6) percent per annum from January 1, 1972 in favor of your Petitioner. On May 11, 1972, the Respondent Dr. William T. Harbour, Sr., filed

a petition in bankruptcy scheduling the judgment debt awarded the Petitioner in the Decree of Divorce dividing the community estate of the parties. On June 12, 1972, your Petitioner filed a Proof of Claim and on May 4, 1975, an order for payment of dividend was entered ordering the trustee in bankruptcy to distribute a dividend in the amount of $894.31 on the debt.

No Application for Determination of Non-Dischargeability of the debt in question was filed in the bankruptcy proceedings on behalf of either Petitioner or Respondent. A general order of discharge was entered in the bankruptcy proceedings on July 12, 1972 discharging the bankrupt, Respondent herein, from all dischargeable debts with the exception of those excepted from discharge under Section 17(a)(7) of the Bankruptcy Act, the pertinent portion to the case at bar.

Elizabeth Ann Harbour, Petitioner herein, the ex-wife of William T. Harbour, Sr., Respondent herein, instituted discovery proceedings against William T. Harbour, Sr., Respondent, to enforce the judgment debt. The Respondent interposed that General Discharge in Bankruptcy entered on July 12, 1972, by way of a Motion for Protection, Plea in Abatement and Request for Restraining Order in Opposition to the Discovery Proceedings. On March 19, 1972, the Court ordered the submission of briefs on the question of law presented and on April 16, 1979, after submission of briefs and oral arguments of counsel, the Court denied the Petitioner's Bill of Discovery-After judgment and determined that the judgment debt sought to be enforced was dischargeable, as a matter of law, within the meaning of the Bankruptcy Act, Section 17 et seq., 11 U.S.C.A., § 35 et. seq.

as amended effective October 19, 1970. Subsequently, Petitioner perfected an appeal to the Court of Civil Appeals of the 14th Supreme Judicial District for the State of Texas. The Court of Civil Appeals affirmed and upon Writ of Error the Supreme Court of the State of Texas denied Petitioner's writ citing no reversible error.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it maintains the conflict between Federal Bankruptcy and Texas Marital Property Law. This case presents important and challenging questions in these two areas; specifically, the conflict which arises between the two due to the public policy of the State of Texas with regard to alimony.

The Petitioner urged throughout these proceedings that the case of *In Re Nunnally,* 506 F.2d 1024, (5th Cir. 1975) controls the issue in the case at bar. In determining whether or not a given debt incurred in a property settlement agreement or entered in a Decree of Divorce falls within the alimony exception to Section 17(a)(7) of the Bankruptcy Act, the Courts have consistently held that it is not what a debt is called but what the substance of it is that controls.

The *Nunnally* case found that debts created between divorced spouses by court ordered divisions of the community estate of the parties are non-dischargeable in bankruptcy based upon the Texas Public Policy against alimony and the factors which Texas courts are required to take into consideration in dividing the community estate of the parties to a divorce.

Due to the failure of the Supreme Court of Texas to accept the Petitioner's Application for Writ of Error,

and render a clarification in these areas, Texas citizens are left in a quandry. In light of the unique Texas Marital Property Law involving community property, the Petitioner and all Texas citizens are prohibited from equally and fairly proceeding under the Federal Bankruptcy Statute, which thereby offends equal protection.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for Writ of Certiorari should be granted.

CRAWFORD & GRISSOM, INC.

STANLEY W. CRAWFORD
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Stanley W. Crawford, the attorney for the Appellant, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of _____, 19____, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States to Robert C. Floyd, counsel for the Respondent.

STANLEY W. CRAWFORD
Counsel for Petitioner

APPENDIX A

State Statute Involved

Texas Family Code Ann. 3.63 (1970):

> In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

APPENDIX B

Federal Statute Involved

Bankruptcy Act 11 U.S.C. 35(a):

(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: Provided, however, that a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankrupty in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this title: And provided further, That a discharge in bankruptcy shall not release or affect any tax lien; (2) are liabilities for

obtaining money or property by false pretenses or false representation, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages and commissions to the extent they are entitled to priority under subdivision (a) of the section 104 of this title; (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment; (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or (8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.

APPENDIX C

Affirmed, and Opinion filed November 28, 1979.

NO. A2212

ELIZABETH ANN HARBOUR, Appellant

vs.

WILLIAM T. HARBOUR, SR., Appellee

Appeal from 311th District Court
of Harris County

This is an appeal from a final order of the trial court denying a post-judgment bill of discovery on the ground that the subject judgment had been discharged in bankruptcy and was therefore no longer enforceable. We affirm.

In the March 17, 1972, decree of divorce of appellant and appellee, appellant was awarded a $25,000.00 judgment as part of the court-ordered division of the community property of the parties. On May 11, of the same year appellee filed a petition in bankruptcy in which he listed as a debt of the estate the $25,000.00 judgment. His divorced wife appeared in bankruptcy court, filed a claim for the judgment, and received a liquidating dividend of $894.31 upon his discharge from bankruptcy on July 12, 1972.

On Febraury 23, 1979, six and one half years later, appellant filed a bill of discovery claiming that the judg-

ment was unpaid. On appellee's motion for protection, the court entered the order referred to above denying discovery and declaring the $25,000.00 judgment unenforceable.

Appellant, in her sole point of error, contends that under the rationale of *In re Nunnally,* 506 F.2d 1024 (5th Cir. 1975) the judgment debt was not a dischargeable debt within the meaning of Section 17 of the Bankruptcy Act of 1898. It is therein provided that among the debts which are not subject to discharge "are those for alimony due or to become due, or for maintenance or support of a wife. . . ." Bankruptcy Act § 17(a), 11 U.S.C. § 35(a) (1970).

Despite the Texas Supreme Court's holding in *United States v. Stelter,* 567 S.W.2d 797, 798 (Tex. Sup. 1978), that " '(a)limony' after divorce, as such, is not permitted in Texas," appellant urges that the *Nunnally* case controls the issue. There the court held that a property division may be a substitute for alimony and hence be non-dischargeable in bankruptcy. Stating that ". . . we should not be bound by the label which the state places on a decree; we must look to its substance", 506 F.2d 1024, 1027, the federal appellate court held that in that case the divorce award fell within the exception from discharge contained in Section 17.

It is interesting, if not decisive, to note that the *Nunnally* case originated as an appeal of the decision of the referee in bankruptcy, while in the case at hand the bankruptcy court's decree was unchallenged for over six years prior to the institution of the discovery proceedings.

It is generally recognized "that a property settlement agreement between spouses is dischargeable in bank-

ruptcy, at least where it is truly or substantially a property agreement, and not an agreement for alimony, support or maintenance." Annot. 74 A.L.R. 2d 758 (1960). Therefore, even under *Nunnally,* when a divorced spouse asserts that the claim has—or has not—been discharged in bankruptcy the order of the divorce court must be examined to determine whether the judgment comprises solely a property division or also includes an obligation to support. *In re Smith,* 436 F. Supp. 469 (N.D. Ga. 1977). Had appellant contested the dischargeability of the judgment in the bankruptcy court in 1972, she would have had the burden of proving that the $25,000.00 debt was an obligation in the nature of alimony, support or maintenance. Bankruptcy Rule 407. She should have no less burden in the district court when asserting the continued viability of a discharged judgment. She has not discharged this burden. There is nothing in the record other than the March 17, 1972, divorce decree that is evidentiary on the issue. This decree indicates clearly that the $25,000.00 judgment was an integral part of the division of the community estate of the parties. Nothing therein smacks of alimony. The trial court did not err in sustaining the motion for protection and in holding the $25,000.00 award was discharged in the bankruptcy proceedings.

Judgment of the trial court is affirmed.

/s/ George E. Miller
Associate Justice

Judgment rendered, and Opinion filed November 28, 1979.

Panel consists of Chief Justice Brown and Associate Justices Miller and Pressler.

APPENDIX D

IN THE
SUPREME COURT OF TEAS

February 27, 1980

No. B-9125

ELIZABETH ANN HARBOUR

vs.

WILLIAM T. HARBOUR, SR.

From Harris County,
Fourteenth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presented no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

Supreme Court, U.S.
FILED
JUN 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

_____ Term, 19____

NO. 79-1914

ELIZABETH ANN HARBOUR,
Petitioner

v.

WILLIAM T. HARBOUR,
Respondent

On Petition For Writ of Certiorari
To The Supreme Court of Texas

RESPONDENT'S OPPOSITION TO WRIT

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IN THE

Supreme Court of the United States

_____ Term, 19____

NO._____

ELIZABETH ANN HARBOUR,
Petitioner

v.

WILLIAM T. HARBOUR,
Respondent

On Petition For Writ of Certiorari
To The Supreme Court of Texas

RESPONDENT'S OPPOSITION TO WRIT

The Respondent prays that a Writ of Certiorari to review the judgments of the Supreme Court of Texas entered in the above case on February 27, 1980, be denied.

OPINION BELOW

The opinion of the Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas is

reported at 590 S.W.2d 828. The Supreme Court of Texas denied Petitioner's Writ of Error citing no reversible error with no opinion.

JURISDICTION

The Respondent urges that jurisdiction is not invoked under 28 U.S.C. 1257(3), in that the Petitioner has failed to show that the validity of any statute, federal or state, has been drawn into question and has also failed to show that any title, right, privilege or immunity claimed under the Constitution or any statute of the United States has been infringed.

QUESTIONS PRESENTED

Petitioner is attempting to collaterally attack a Texas State Court's decree, as well as the bankruptcy court's determination, that a debt created in the Trial Court's decree was not dischargeable in bankruptcy. Petitioner initially filed a Bill of Discovery to determine the assets of the Respondent in an attempt to satisfy the debt created by the Trial Court's final decree. The same Trial Court which issued the decree establishing the debt reviewed its file, the bankruptcy court's action in discharging the Respondent, listened to argument of counsel, and determined that the debt created by its decree was not for maintenance and support but was in fact a division of community property and therefore dischargeable within the meaning of the Bankruptcy Act, and in fact had been discharged.

The Trial Court's decision was affirmed by the Court of Civil Appeals for the 14th Supreme Judicial District of Texas on the grounds that Petitioner had failed to prove that the debt contained elements for support and

maintenance and was therefore a simple division of community property. In so holding, the Appellate Court stated as the general rule that a debt in settlement of property is dischargeable in bankruptcy when it is not for future support and maintenance. The Texas Appellate Court followed the 5th Circuit's holding in the case of *In Re Nunnally,* 506 F.2d 1024 (5th Cir. 1975), that the substance of the debt is controlling. The Appellate Court refused to overturn the Trial Court's ruling in the absence of any additional evidence by Petitioner that the debt in question was for support and maintenance.

The Supreme Court of Texas denied the Petitioner's Application for Writ of Error, citing no reversible error in the Court of Civil Appeals' decision. The question presented to this court is:

> Whether the judgment rendered by the Court of Civil Appeals for the 14th Supreme Judicial District of Texas is correct in following the *Nunnally* rule that whether a debt created by a divorce decree is dischargeable in bankruptcy is a question of fact depending on whether the debt is a simple division of property or is instead a debt for future support and maintenance.

STATE AND FEDERAL STATUTES INVOLVED

The pertinent portions of the Bankruptcy Act, §§ 17, 17(a), 11 USC §§ 35, 35(a) as amended effective October 19, 1970, and the Texas Family Code Ann. § 3.63 (1973) are set forth in the appendix.

STATEMENT

Respondent does not agree with Petitioner's Statement of the Case. It would show the Court as follows: This is

an appeal from an order denying the Petitioner the right to discover Respondent's assets in an attempt to satisfy a judgment which had been discharged in bankruptcy. The Texas Trial Court from which the divorce decree had issued found that the debt created by the judgment was dischargeable by the bankruptcy court.

On May 11, 1972, Respondent filed a petition in bankruptcy. Petitioner was listed as an unsecured creditor with the $25,000.00 judgment in issue as the amount of her unsecured claim. Petitioner was represented in the bankruptcy proceedings by counsel and was notified of the various hearings during those proceedings, and of her right to file objections to or application for determination of the dischargability of the $25,000.00 judgment in issue. Thereafter, Petitioner was awarded and received $894.31 as her pro rata amount of the unsecured claim. In 1972 the bankruptcy court discharged the Respondent from any further liability on the debt created by the divorce decree. Petitioner made no appeal of the bankruptcy proceedings.

In 1979, Petitioner attempted to initiate discovery proceedings in an attempt to collect the discharged judgment. The Trial Court, upon request of Petitioner, reviewed its entire proceedings, as well as those of the bankruptcy court, and found that the $25,000.00 was a dischargeable debt. Petitioner has attempted to collaterally attack the Trial Court's initial judgment, as well as its present holding. The Texas Court of Civil Appeals clearly decided that Petitioner had failed to meet her burden of proving that the award was for support and maintenance rather than for a division of community property. Upon Writ of Error, the Supreme Court of the State of Texas denied Petitioner's writ citing no reversible error.

REASONS FOR DENYING WRIT

In addition to the lack of jurisdiction, the decision below should not be reviewed because there are no grounds for appeal. In effect, Petitioner is appealing from an unfavorable finding of fact. There is no conflict between the Federal Bankruptcy Act and the Texas laws regarding alimony. Texas fully accepts the rule of *Nunnally, supra,* and the Court of Civil Appeals correctly applied that rule. Petitioner has had to misstate the opinion of the Texas Court of Civil Appeals as well as misconstrue the 5th Circuit's *Nunnally* decision in order to raise a federal question.

The Texas Courts recognize the holding of *In Re Nunnally*. However, Petitioner urges that *Nunnally* stands for the proposition that all debts created between divorced spouses by court-ordered divisions of the community estate are to be non-dischargeable in bankruptcy. Respondent would show that, instead, the *Nunnally* case held that such debts *may be,* in certain cases, non-dischargeable where the division of assets is in effect for the future support and maintenance of one of the parties. "[I]t is clear [that] support in the future *can* play a significant role in the divorce court's property division and that what may appear to be a mere division of assets *may,* in fact, under a Texas divorce decree, contain a substantial amount of alimony . . ." 506 F.2d at 1027 (emphasis added).

Clearly, *Nunnally* holds that there is a factual issue in each case as to whether the payment is for support and maintenance or is simply a division of property.

We do not have a higher court attempting to interpret the factual findings contained in a trial court's decree.

In this case, the same trial court that granted the divorce decree determined that the division of property involved was not for future support and maintenance. The opinion from the Texas Court of Appeals simply refuses to overturn that finding of fact in the absence of any evidence to the contrary. Petitioner has factually failed to meet her burden of proof and has yet to produce any evidence that would show any part of the debt was for support and maintenance.

Texas citizens are not "left in a quandry", as Petitioner asserts, because the law is clear: where a divorce decree creates a debt which is for future support and maintenance, the debt is not dischargeable, but where, as here, the debt is not for support and maintenance, the debt is dischargeable.

Petitioner has failed to raise any issues of law; she is simply appealing from an unfavorable finding of fact.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT C. FLOYD
1100 Esperson Building
Houston, Texas 77002
Attorney for Respondent

APPENDIX A

State Statute Involved

Texas Family Code Ann. 3.63 (1970):

> In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

APPENDIX B

Federal Statute Involved

Bankruptcy Act 11 U.S.C. 35(a):

(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: Provided, however, that a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this title: And provided further, That a discharge in bankruptcy shall not release or affect any tax lien; (2) are liabilities for

obtaining money or property by false pretenses or false representation, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages and commissions to the extent they are entitled to priority under subdivision (a) of the section 104 of this title; (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment; (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or (8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.

APPENDIX C

Affirmed, and Opinion filed November 28, 1979.

NO. A2212

ELIZABETH ANN HARBOUR, Appellant

vs.

WILLIAM T. HARBOUR, SR., Appellee

Appeal from 311th District Court
of Harris County

This is an appeal from a final order of the trial court denying a post-judgment bill of discovery on the ground that the subject judgment had been discharged in bankruptcy and was therefore no longer enforceable. We affirm.

In the March 17, 1972, decree of divorce of appellant and appellee, appellant was awarded a $25,000.00 judgment as part of the court-ordered division of the community property of the parties. On May 11, of the same year appellee filed a petition in bankruptcy in which he listed as a debt of the estate the $25,000.00 judgment. His divorced wife appeared in bankruptcy court, filed a claim for the judgment, and received a liquidating dividend of $894.31 upon his discharge from bankruptcy on July 12, 1972.

On February 23, 1979, six and one half years later, appellant filed a bill of discovery claiming that the judg-

ment was unpaid. On appellee's motion for protection, the court entered the order referred to above denying discovery and declaring the $25,000.00 judgment unenforceable.

Appellant, in her sole point of error, contends that under the rationale of *In re Nunnally,* 506 F.2d 1024 (5th Cir. 1975) the judgment debt was not a dischargeable debt within the meaning of Section 17 of the Bankruptcy Act of 1898. It is therein provided that among the debts which are not subject to discharge "are those for alimony due or to become due, or for maintentance or support of a wife. . . ." Bankruptcy Act § 17(a), 11 U.S.C. § 35(a) (1970).

Despite the Texas Supreme Court's holding in *United States v. Stelter,* 567 S.W.2d 797, 798 (Tex. Sup. 1978), that " '(a)limony' after divorce, as such, is not permitted in Texas," appellant urges that the *Nunnally* case controls the issue. There the court held that a property division may be a substitute for alimony and hence be non-dischargeable in bankruptcy. Stating that ". . . we should not be bound by the label which the state places on a decree; we must look to its substance", 506 F.2d 1024, 1027, the federal appellate court held that in that case the divorce award fell within the exception from discharge contained in Section 17.

It is interesting if not decisive, to note that the *Nunnally* case originated as an appeal of the decision of the referee in bankruptcy, while in the case at hand the bankruptcy court's decree was unchallenged for over six years prior to the institution of the discovery proceedings.

It is generally recognized "that a property settlement agreement between spouses is dischargeable in bank-

ruptcy, at least where it is truly or substantially a property agreement, and not an agreement for alimony, support or maintenance." Annot. 74 A.L.R. 2d 758 (1960). Therefore, even under *Nunnally,* when a divorced spouse asserts that the claim has—or has not—been discharged in bankruptcy the order of the divorce court must be examined to determine whether the judgment comprises solely a property division or also includes an obligation to support. *In re Smith,* 436 F. Supp. 469 (N.D. Ga. 1977). Had appellant contested the dischargability of the judgment in the bankruptcy court in 1972, she would have had the burden of proving that the $25,000.00 debt was an obligation in the nature of alimony, support or maintenance. Bankruptcy Rule 407. She should have no less burden in the district court when asserting the continued viability of a discharged judgment. She has not discharged this burden. There is nothing in the record other than the March 17, 1972, divorce decree that is evidentiary on the issue. This decree indicates clearly that the $25,000.00 judgment was an integral part of the division of the community estate of the parties. Nothing therein smacks of alimony. The trial court did not err in sustaining the motion for protection and in holding the $25,000.00 award was discharged in the bankruptcy proceedings.

Judgment of the trial court is affirmed.

/s/ George E. Miller
Associate Justice

Judgment rendered, and Opinion filed November 28, 1979.

Panel consists of Chief Justice Brown and Associate Justices Miller and Pressler.

APPENDIX D

IN THE
SUPREME COURT OF TEXAS

February 27, 1980

No. B-9125

ELIZABETH ANN HARBOUR

vs.

WILLIAM T. HARBOUR, SR.

From Harris County,
Fourteenth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presented no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 79-1914

ELIZABETH ANN HARBOUR,
Petitioner

v.

WILLIAM T. HARBOUR,
Respondent

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO WRIT

CRAWFORD, GRISSOM, CROW
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 79-1914

ELIZABETH ANN HARBOUR,
Petitioner

v.

WILLIAM T. HARBOUR,
Respondent

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO WRIT

The Respondent has attempted to narrow the issue in this case by asserting that the Petitioner is appealing from an unfavorable finding of fact. The Respondent, in his opposition to writ, has in essence, stated the true problem with the Texas Court of Civil Appeals opinion. A close examination of *In Re Nunnally*, Texas law and Federal law will emphasize the lack of equal protection for Texas residents and those similarly situated.

In existence at the time Petitioner first initiated her action were two (2) statutory enactments. One of the statutes is 11 U.S.C. Section 35(a)(1970), Bankruptcy

Act. Under the Bankruptcy Act, a discharge releases a bankrupt from all of his provable debts. Therein, the statute provides for several exceptions. One of the exceptions, 35(a)(7), provides that alimony due or an obligation for maintenance and support of a wife or child is nondischargeable.

The second applicable statutory enactment is Texas Family Code Ann. 3.63 (1970) wherein it has been interpreted by the courts in Texas to be public policy to prohibit permanent alimony in divorce settlements and decrees. *Francis v. Francis,* 412 S.W.2d 29 (Tex. 1967).

The next consideration is the decision of the Court of Civil Appeals below. The Petitioner respectfully accepts Respondent's statement of the court's judgment that Petitioner failed to meet her burden of proof. Although it is not clear as to what that burden is, the Court of Civil Appeals obviously required the Petitioner to show that the decree of divorce and the marital property settlement provided for alimony and maintenance and support in order for this debt to be non-dischargeable. Here is the confusion referred to in Petitioner's Application for Writ. If Petitioner would show that the property settlement provided for alimony and maintenance and support, the settlement and decree would be void under the Texas Family Code mentioned above. Therefore, the Petitioner and those similarly situated in the State of Texas are left with a divorce decree and property settlement agreement which creates a debt for the Respondent *but* is thereafter discharged when the Respondent files for bankruptcy.

This result is entirely contrary to the spirit and intent of the bankruptcy laws. The exception referred to, 35 (a)(7) was added to the Bankruptcy Act in 1903. Pre-

ceding the effective date of this section, the United States Supreme Court examined the dischargeability of alimony obligations in the case of *Audobon v. Shufeldt,* 181 U.S. 575 (1901). There the Court, with Mr. Justice Gray delivering the opinion of the Court, said:

> "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, expressed or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction."

The intent of Congress in passing the Bankruptcy Act, was *not* to provide for a release of a father from his obligation to support his children and spouse by his discharge in bankruptcy. *Melichar v. Ost,* 445 F.Supp. 1162 (D. Maryland 1977). *Audobon* was followed by *Dunbar v. Dunbar,* 190 U.S. 340 (1902) where, in full realization that the effective date of the alimony exception was approaching, the Court indicated that the exception paves the way for a legislative trend in the direction of non-discharging an obligation of the bankrupt for the support of his wife and children. Additionally, as presented by Petitioner in her Application for Writ, *In Re Nunnally,* has interpreted Texas law to be that if a substance of a debt amounts to alimony or for maintenance and support, the debt would fall within the alimony exception and therefore be non-dischargeable. Therefore, Petitioner would respectfully submit that upon considering the legislative intent of the bankruptcy law, as interpreted by the United States Supreme Court, and in light of the *Nunnally* decision, the failure of the trial court to find that the

Respondent's debt to his spouse and children was non-dischargeable as a matter of law was clearly error, effectively denying Petitioner's right to equal protection.

It is appropriate, at this time, to point out to this Honorable Court an additional indication of the legislative intent of Congress. This is referenced by the new Bankruptcy Code, 11 U.S.C. 101 et. seq. (1979). In an attempt to alleviate the confusion mentioned above, the Congress provided specifically that a debt to a spouse in connection with a separation agreement is non-dischargeable.

Furthermore, Petitioner would show to this Court that if the conclusion of the Respondent is accepted and *Nunnally* does require a fact finding, Petitioner would submit that no finding of fact was made by the trial judge despite the efforts of Petitioner to obtain a full hearing on all of the facts in the presence of a jury. The trial court's decision came only after both parties argued before the Court and submitted briefs. The trial court totally ignored *Nunnally* and ruled, as a matter of law, that Respondent's obligation of support for Petitioner was discharged.

The Petitioner would respectfully submit to this Court that a truly important constitutional question of equal protection to the citizens of the State of Texas exist in light of the conflict between the bankruptcy laws and Texas public policy prohibiting alimony. The necessity for a clarification by this Court is essential in the development of Federal Bankruptcy law as it relates to Texas decrees of divorce.

Respectfully submitted,

CRAWFORD, GRISSOM, CROW
& RICHARDS

STANLEY W. CRAWFORD
3700 Montrose
Houston, Texas 77006
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Stanley W. Crawford, the attorney for the Appellant, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of September, 1980, I served copies of the foregoing Petitioner's Reply to Respondent's Opposition to Writ upon Robert C. Floyd, counsel for the Respondent.

STANLEY W. CRAWFORD
Counsel for Petitioner

APPENDIX A

Federal Statute Involved

Bankruptcy Act 11 U.S.C. § 523:

A discharge under section 727, 1141 or 1328(b) of this title does not discharge an individual debtor from any debt—

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, . . .

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File & Fee Docket Courts Harris County

No. 854633

Court COURT OF DOMESTIC RELATIONS #4

WILLIAM T. HARBOUR, SR.
vs.
ELIZABETH ANNE HARBOUR

Pltf. Atty. Miller, Gann, & Perdue

Deft. Atty.

Filed DEC 1 1970

Transferred

Action For DIVORCE

Costs Paid By:

Charges Paid By

(MOTION) 3-27-72 DW 3-23-72 SB

Jury Fee	10/21/71	5.00	HERBERT L. COFFMAN
Stenographer Fee		5.00	

DIVORCE

Clerk's Fee:	
Filing	$15.00
Issuing Citation & 1 Copy	4.00
Certificate-BVS	1.00
Child Support	3.00
Law Library	2.50
Sheriff's Jury Fee	.50
Sheriff / Constable Service on Citation	4.00
Total Paid	$30.00
Additional Fees	

AUDITED 1970 FULLERTON, County Auditor

2.00 12-3-71 Herbert L. Coffman

CLERK SUBP 1.27 SHERIFF

CLERK - MOTION - 10.00 12-8-71 SHERIFF - SUBP 1.27 GREEVES

Depo: Toby Gillis 145.40 Pltf. Atty.

CLERK - Motion to Reduce C/S 4.00 12-29-71

SHERIFF 4.00 Pltf. Atty.

Depo: Dr. Frank Rose 38.00 Pltf. Herbert Coffman

Depo: Neal Nelson 45.00 Pltf.

Subpoena: Dr. Daniel Jackson 30.00 Pltf. Herbert Coffman

Subpoena: ELIZABETH ANNE HARBOUR 29.00 Pltf. - MILLER, GANN & PERDUE

Subpoena: CHERYL DAURICH - 27.00 Pltf.

Depo: BEVERLY WHEELER - 39.00 Pltf.

Depo: RACHEL MURPHY - 58.50 Pltf.

Depo: CHERYL DAURICH - 28.25 Deft.

Depo: NEAL M. NELSON - 31.25 Pltf. - MILLER, GANN & PERDUE

Depo: RHONDA WEXLER - 43.00 Pltf.

Depo: DR. DAVID LITOWSKY - 40.00 Pltf.

HERBERT L. COFFMAN) ABSTRACT - 4/4/72 - 2.00 MILLER, GANN & PERDUE

DEPO: MERILYN STINSON - 118.25 Pltf. - MILLER, GANN & PERDUE

CLERK SUBP 4117	11.00	12-31-71	12-8-70	10.00	CASH
SHERIFF	12.00	12-31-71	12-29-71	GOV	CASH
CLERK SUBP	10.00	12-3-71	12-1-71	29.00	CASH
SHERIFF	36.00	12-3-71	12-2-71	46.00	CASH
CLERK SUBP	1.00	12-7-71	12-3-71	1.00	CASH
Depo: Elizabeth Ann Harbour 1st	292.50	Pltf Herbert Coffman	12-7-71	1.00	CASH
Depo: Tom Brack	63.80	Pltf Herbert Coffman	12-22-71	10.00	CASH
Depo: Robert A Hauser	221.00	Pltf Herbert Coffman	12-22-71	10.00	CASH Sec 8 Supplemental Hearing
Depo: Dr William T. Harbour Sr.	68.75	Deft Fred Rottinger			
Depo: William T. Harbour	306.45	Deft			
Depo: Elizabeth Ann Harbour	230.00	Pltf Atty			
CLERK SUBP	1.00	12-7-71			
Depos: Frank Wexler 1260 pltf. Herbert Coffman - Casper Robinson Compton 99.40 pltf. Herbert Coffman					

Refund Plaintiff's Use

Service 12-3-70 ELIZABETH ANNE HARBOUR (CT)
3-5-71 - Elizabeth Anne Harbour (CT) Except

Judgment For Granted 854/147 12-6-71 3-17-72

Signed R. HICKEY, JR. Herbert L. Coffman given to produce, etc. dismissed

Motion for New Trial Overruled 803/810 4-6-72

Appeal

Execution - DOC. 61 Page 34 Issued 1-19-72

Remarks: Costs to be paid by E.P.O: Herbert L. Coffman (Steno Fee 5.00) Deft

Miller, Gann & Perdue Atty. - W/C

Ref'd Ltr. 3-23-72

APPENDIX B

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